No. 86-931

IN THE

Supreme Court of the United States

OCTOBER TERM 1986

IRVING MACHLEDER,

Petitioner,

v.

CBS INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT CBS INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THIS COURT SHOULD GRANT CERTIORARI TO REVIEW AN ORDER OF THE COURT OF APPEALS DISMISSING PETITIONER'S COMPLAINT, WHERE THE JURY EXPLICITLY FOUND THAT PETITIONER DID NOT PROVE THAT RESPONDENT'S NEWS BROADCAST FALSELY PORTRAYED PETITIONER AS AN ILLEGAL DUMPER OF CHEMICAL WASTES, AND WHERE THE JURY IMPOSED LIABILITY BASED ON PETITIONER'S ALTERNATIVE CLAIM THAT HE WAS FALSELY PORTRAYED AS INTEMPERATE AND EVASIVE, A PORTRAYAL WHICH THE COURT OF APPEALS HELD IS NOT ACTIONABLE AS A MATTER OF NEW JERSEY LAW ON THE FACTS OF THIS CASE.

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TABLE OF AUTHORITIES

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Excluding its wholly-owned subsidiaries, the following companies were subsidiaries or affiliates of Respondent CBS Inc. as of December 15, 1986: Rainbow Programming Services Company II [Limited Partnership]; Entertainment Distributors Company Pty. Limited; Music Publishing Co. of Australia Pty. Limited; United Artists Music (Australia) Pty. Limited; Grammofonselskabs Distributions Centralen APS; CBS Epic (Thailand) Limited; CBS/FOX Company, the [General Partnership]; CBS/FOX VIDEO (Germany) G.m.b.H.; CBS/FOX VIDEO French Film Licensing Corp.; CBS/FOX VIDEO (France) S.A.; CBS/FOX VIDEO International S.A.R.L.; CBS/FOX VIDEO (New Zealand) Limited; CBS/FOX VIDEO (Far East) K.K.; CBS/FOX VIDEO (South Pacific) Pty. Limited; CBS/FOX VIDEO (Canada) Limited; CBS/FOX VIDEO (Holdings) Ltd.; CBS/FOX VIDEO Limited; CBS/FOX VIDEO (Espanola) S.A.; CBS Gramophone Records and Tapes (India) Limited; CBS Disques S.A.; CBS/MTM Company, The [General Partnership]; CBS Nigeria Limited; CBS Records (Kenya) Limited; PEC Musiikkitukko OY; Music Service Center Gesellschaft m.b.H; CBS/SONY Group Inc.; SD Kansai Inc.; CBS/SONY INC.; CBS/SONY Family Club, Inc.; CBS/SONY Records Inc.; April Music Inc. (Japan); CBS/SONY California, Inc.; EPIC/SONY, Inc.; CBS/SONY Hong Kong Limited; CBS/Sony Publishing Inc.; Japan Record Distribution System, Inc.; Music Plaza Inc.; SD Hokkaido Inc.; The Rainbow Service Company [General Partnership]; Cablevision Programming New England Corporation; SportsChannel Associates [General Partnership]; SportsChannel Prism Associates [General Partnership]; SportsChannel Chicago Associates [General Partnership]; Winterland Concessions Company; Winterland Productions, Ltd.; and Gilda S.A.R.L.

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BRIEF OF RESPONDENT CBS INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner Irving Machleder seeks a Writ of Certiorari to review an Order of the United States Court of Appeals for the Second Circuit reversing various rulings of the District Court and ordering that Respondent is entitled to judgment dismissing Petitioner's complaint.

This case was submitted to the jury on Petitioner's claims for libel and false light invasion of privacy. Petitioner asserted in his libel claim that he was falsely portrayed in Respondent's news broadcast as an illegal dumper of chemical wastes. In a special libel verdict the jury found for Respondent on the ground that, while the broadcast conveyed the message that Petitioner had illegally dumped the chemicals, Petitioner had not proved the substantial falsity of that message. App. A at 27-28. On Petitioner's invasion of privacy theory he asserted that he was falsely

portrayed either as an illegal dumper or as being intemperate and evasive. The jury found for Petitioner on his false light claim without specifying the basis for the verdict.

The Court of Appeals unanimously held that Petitioner's false light claim, based on his view that he was portrayed as an illegal dumper, was precluded by the unchallenged specific finding by the jury in its special libel verdict. The Court further held that the allegation that the broadcast portrayed Petitioner as intemperate and evasive could not support a verdict in Petitioner's favor under New Jersey law because (a) he had offered no evidence that such a portrayal was false and (b) a reasonable jury could not find that such a portrayal is highly offensive to a person of ordinary sensibilities. App. A at 28-30. Interpreting New Jersey common law, the Court of Appeals affirmed the District Court's rulings granting summary judgment to Respondent on Petitioner's claims of trespass and invasion of privacy based on improper publication of truthful private facts.[1] App. A at 30-32. The only issue before this Court is whether this Court should review the Court of Appeals' dismissal of Petitioner's false light invasion of privacy claim.

PROCEDURAL HISTORY

In 1979, Petitioner and his company, Flexcraft Industries, Inc. ("Flexcraft"), filed their complaint in this diversity case against Respondent CBS Inc., one of its reporters, Arnold Diaz, one of Diaz's assistants, and three members of Diaz's film crew. Petitioner's complaint included claims for libel, invasion of privacy, trespass, assault and slander. Following completion of discovery, Respondent filed a motion for summary judgment as to all the claims. Petitioner cross-moved for summary judgment. On April 17, 1982, the District Court (Duffy, J.) denied Petitioner's cross-motion and granted Respondent's motion as to certain of Petitioner's claims. *Machleder* v. *Diaz*, 538 F. Supp. 1364 (S.D.N.Y. 1982). The Court held, *inter alia*, that New Jersey

1. Petitioner presents no arguments regarding the trespass and improper publicity claims in the Petition. Neither claim raises any issues of constitutional or federal law.

substantive law applied, and that although Respondent's broadcast "without question, involved a subject of public interest," App. C at 12, it was capable of a defamatory meaning and raised triable issues of falsity and fault. Further, construing the complaint as alleging false light invasion of privacy, the Court held that the report "cannot be deemed inoffensive as a matter of law." App. C at 17. The Court dismissed Petitioner's claim of trespass, and two possible invasion of privacy claims based on intrusion upon seclusion and improper publication of truthful private facts. App. C at 16, 18. Neither party immediately appealed from this interlocutory order.

Trial of the action commenced in May 1985, with Hon. Peter K. Leisure presiding. The jury answered special interrogatories and returned separate, special verdicts on Petitioner's libel and false light claims on a form submitted to them. The jury's special verdict on libel was for Respondent, while its separate verdict on false light invasion of privacy was for Petitioner. The jury awarded Petitioner $250,000 in compensatory damages and $1 million in punitive damages. The District Court denied Respondent's motions for judgment notwithstanding the verdict, for a new trial and for a remittitur. *Machleder* v. *Diaz*, 618 F. Supp. 1367 (S.D.N.Y. 1985).

Respondent appealed from, *inter alia*, the District Court's denial of summary judgment, from the judgment entered in Petitioner's favor on the false light invasion of privacy claim, and from the District Court's denial of Respondent's motions for a directed verdict, judgment n.o.v. and a new trial. Although Petitioner cross-appealed from the judgment dismissing the trespass and improper publicity claims, he did not appeal the dismissal of his libel claim.

On appeal, the United States Court of Appeals for the Second Circuit unanimously reversed and ordered dismissal of the complaint. *Machleder* v. *Diaz*, 801 F.2d 46 (2d Cir. 1986). The Court's opinion harmonized the jury's answers to the special interrogatories in the only reasonable way. The Court held that the jury's finding for Petitioner on his false light claim could only

have been based on a finding that he was falsely portrayed as being "intemperate and evasive." App. A at 24-28. Examining New Jersey law and the evidence presented by Petitioner on that point, the Court held that the evidence was insufficient as a matter of law and could not support a finding of falsity. App. A at 27-28. In this regard, the Court noted that the portrayal about which Petitioner was complaining was a virtually unedited film of Petitioner's public behavior. App. A at 28. Moreover, continued the Court, as a matter of New Jersey law an alleged portrayal of a person as "intemperate and evasive" cannot support a jury verdict because such a portrayal, even if false, is not "highly offensive to a reasonable person." App. A at 28-30. Because the broadcast was neither false nor "highly offensive to a reasonable person," the Court held that Respondent was entitled to judgment on Petitioner's false light claim. App. A at 32. As the discussion hereinafter demonstrates, the Court's unanimous opinion was entirely correct and raises no issues warranting review by this Court.

STATEMENT OF FACTS

This action arises out of the filming and broadcast on May 22, 1979 by WCBS-TV (Respondent's owned and operated New York television station) of a news report concerning chemical wastes in New Jersey by Respondent's Emmy Award winning New Jersey reporter, Arnold Diaz. On May 21, 1979 Diaz received a telephone call from Michael Rosenberg of the New Jersey Department of Environmental Protection directing Diaz to a dump site in Newark containing hundreds of barrels of hazardous waste. Rosenberg had previously provided Diaz with information about hazardous sites which Rosenberg believed the state authorities were neglecting.

When Diaz and a film crew arrived at the Newark dumpsite the next day, they observed a large open area overgrown with weeds and strewn with hundreds of rusting 55-gallon drums. The contents of many of the drums, which were labeled "hazardous" and

"flammable," were leaking into a nearby waterway. A noxious odor pervaded the area.

Flexcraft, a company which used hazardous chemicals (stored in 55-gallon drums) in connection with the manufacture of paints, adhesives, and coatings, was located approximately 25 feet away from the rusting drums. The waterway was located behind the building. To obtain information about the drums, Diaz approached the Flexcraft building where he met Bruce Machleder, one of Petitioner's sons and the manager of Flexcraft. When Diaz asked Bruce Machleder about the drums, Diaz was directed "to go to the office" in front of the building.

Diaz proceeded with his crew to the front of the Flexcraft building where he encountered Petitioner. As the recorded film of what followed clearly reveals, Machleder interrupted Diaz's initial question about the drums by pushing Diaz and shouting "get that damn camera out of here . . . I don't want, I don't need, I don't need any publicity." Machleder then began to walk into the Flexcraft office. Before reaching the door, Machleder turned around and told Diaz that he and Flexcraft had not dumped the barrels, and that Diaz should contact the Newark Housing Authority for further information. Thereafter, Bruce Machleder invited Diaz to enter the office, where he told Diaz that the presence of the barrels had previously been reported to the United States Coast Guard, the New Jersey Turnpike Authority, and the Newark Housing Authority.

Diaz immediately called Ann Sorkowitz, a CBS research assistant, and asked her to attempt to corroborate what Bruce Machleder had told him. Diaz subsequently conducted an on-site taped interview of Newark Deputy Fire Chief Joseph McLaughlin who confirmed that the site was hazardous. Following the McLaughlin interview, Diaz returned to the WCBS-TV studios in New York City where he learned from Sorkowitz that the Coast Guard and the Turnpike Authority had been aware for two years of the existence of the barrels.

That evening, Diaz's report was aired on WCBS-TV's "6 O'clock Report." It reported that a hazardous waste dump site

existed in Newark and that the authorities had done nothing about it. The report presented a chronology of Diaz's investigation that day, including the virtually unedited film of Machleder's angry response to Diaz's question about the barrels and the fact that Diaz had been told that Machleder had reported the dumping to state and local authorities. A transcript of the entire broadcast is contained in the District Court's opinion denying Respondent's motion for summary judgment and in the opinion of the Court of Appeals. Petition at App. A & App. C.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

In this state law diversity case, Petitioner has presented no issues warranting this Court's review of the decision below. Petitioner's only constitutional argument (that he was denied his Seventh Amendment right to trial by jury) is frivolous. The Court of Appeals' decision does not conflict in any way with any decisions of this Court or with those of other Circuits. The Court of Appeals faithfully and correctly adhered to this Court's settled precedents governing review of special jury verdicts and interrogatories and, relying on New Jersey state law, ordered dismissal of Petitioner's complaint. The Court of Appeals properly reconciled the special verdicts and interrogatories in the light of the evidence, instructions and verdict forms.

Petitioner argues that the Court of Appeals should have reconciled the jury's answers to special interrogatories in such a way as would sustain "the verdict." Petition at 12, 19. Yet, Petitioner has conceded that there were "separate" verdicts (Petition at 17), and that one of those verdicts was in favor of Respondent. He also argues that, rather than order dismissal of his complaint, the Court of Appeals should have remanded the case for a new trial. However, Petitioner consciously failed to argue that a remand was necessary in the Court of Appeals.

Even if Petitioner had requested such relief, the Court of Appeals undoubtedly would have refused it. Any new trial in this matter would necessarily be limited to the issue of whether

Respondent is liable for falsely portraying Petitioner as being "intemperate and evasive," because Petitioner's failure to appeal from the judgment dismissing his libel claim precludes him from relitigating the falsity of the alleged portrayal of Petitioner as an illegal dumper.

Finally, portrayal of Petitioner as "intemperate and evasive" is not actionable as a matter of New Jersey law because it is neither false nor highly offensive to a person of ordinary sensibilities. Thus, the Court of Appeals correctly ordered that the District Court should have entered judgment in favor of Respondent on the false light claim. This Court should not review the Court of Appeals' analysis and application of New Jersey law.

ARGUMENT

POINT I

THE WRIT SHOULD BE DENIED BECAUSE PETITIONER CONCEDES THAT THE COURT OF APPEALS APPLIED THE PROPER LEGAL STANDARDS AND BECAUSE THE COURT CORRECTLY RECONCILED THE JURY'S SPECIAL FINDINGS ON LIBEL AND FALSE LIGHT INVASION OF PRIVACY AND ORDERED DISMISSAL OF THE COMPLAINT.

Petitioner concedes that the libel and false light invasion of privacy verdicts were separate, "special verdicts" under Fed. R. Civ. P. 49. Petitioner argues, however, that his Seventh and Fourteenth Amendment rights were violated because the holding of the Court of Appeals "made the jury's special verdicts inconsistent." Petition at 17. Yet, the Seventh Amendment entitled Petitioner only to a jury determination of triable issues of fact, not to a verdict in his favor. His challenge to the Court of Appeals' decision is thus limited to the Court's application of legal standards with which he agrees. This Court should not review the Second Circuit's fact-specific analysis of the jury findings and instructions in this case.

Under Rule 49, courts evaluate jury interrogatories "in the light of the surrounding circumstances and in connection with the

pleadings, instructions and issues submitted." C. Wright & A. Miller, *Federal Practice and Procedure* § 2510 at 516 (1963). Respondent agrees with Petitioner that "where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic and Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962). Put another way, the court must "attempt to reconcile the jury's findings, by exegesis if necessary . . . ." Petition at 18 (citing *Gallick* v. *Baltimore and Ohio Railroad Co.*, 372 U.S. 108, 119 (1963)). Here, the unanimous Court of Appeals followed these rules to the letter.

Jury interrogatories are designed to permit the reviewing court to determine precisely what the jury decided, and to enter an appropriate judgment on those findings. The rationale for reconciling a jury's answers to interrogatories is to avoid the need for a new trial. *See Ford Motor Co.* v. *Dallas Power & Light Co.*, 499 F.2d 400, 410 n.18 (5th Cir. 1974); *Security Mutual Casualty Co.* v. *Affiliated FM Ins. Co.*, 471 F.2d 238, 245 n.9 (8th Cir. 1972). The correct approach under Rule 49 is to construe the interrogatory answers in a way that would show that the jury understood and followed the instructions submitted to them.[2] Absent an irreconcilable inconsistency precluding the entry of any judgment under the applicable law, remand for a new trial is unnecessary.[3] *See Griffin* v. *Matherne*, 471 F.2d 911 (5th Cir. 1973); *Julien J. Studley Inc.* v. *Gulf Oil Corp.*, 407 F.2d 521 (2d Cir. 1969).

Here, the libel and the invasion of privacy instructions were different in only one material respect. A libel verdict for Petitioner would have required the jury to find that Respondent falsely conveyed the message that Petitioner was responsible for the illegal dumping. The invasion of privacy instruction, however, permitted imposition of liability if the Petitioner proved

2. Underlying this approach is the fundamental presumption that the jury followed the charge. *See, e.g., Wolfe* v. *Virusky*, 470 F.2d 831, 836 (5th Cir. 1972).

3. Petitioner concedes as much. *See* Petition at 21 (quoting 5A *Moore's Federal Practice* § 49.03).

either (a) that he was not responsible for the illegal dumping or (b) that he was not "intemperate and evasive." Since the jury specifically found on the libel claim that Petitioner had not proved he was falsely portrayed as an illegal dumper, its ruling for Petitioner on his alternative false light claim could only have been based on the belief that he was incorrectly portrayed as being intemperate and evasive. Thus, the only remaining question is whether the District Court should have submitted the alternative "intemperate and evasive" basis for liability to the jury and whether, once the jury returned its verdicts, the District Court should have dismissed the invasion of privacy claim. The Court of Appeals correctly ruled for Respondent on that question of New Jersey law. *See* Point II *infra.*

Citing no authority, Petitioner pretends that reconciliation requires the Court to strive to uphold *his* verdict on the invasion of privacy claim, while ignoring Respondent's separate verdict on the libel claim. *See* Petition at 17. Here, the unanimous Second Circuit reconciled the interrogatory answers and reversed because the District Court had incorrectly analyzed those findings.[4] That the reconciled findings ultimately require dismissal is no bar to the action of the Court of Appeals. *See, e.g., Jones & Laughlin Steel* v. *Johns-Manville Sales,* 626 F 2d 280 (3d Cir. 1980) (court reconciled apparently inconsistent answers to special interrogatories and reversed the district court's denial of defendant's motion for judgment n.o.v.).

In an effort to discredit the only rational reconciliation of the jury's interrogatories, Petitioner proffers a series of arguments that are either factually unfounded or legally irrelevant.

First, Petitioner points to an alleged distinction between the dumping allegation as framed in the libel claim and as framed in the false light claim. He argues that the "libel claim required the jury to find that the broadcast falsely stated that petitioner was *the* dumper," while the false light instruction asked the jury to

4. The District court noted the standard (and cited applicable precedent for resolving apparent inconsistencies), but never explained its reasoning which led to the entry of judgment on the record. See JA 1428-29; App. B.

determine whether the Petitioner was "involved in the dumping." Petition at 20. This distinction is without substance, but in any event Petitioner is mistaken, as the explicit language of the false light instruction indicates.[5] Moreover, under the libel instruction given at Petitioner's request, JA 678, the jury could have found for the Petitioner if it believed that the broadcast falsely portrayed him as "responsible for the dumping." JA 1404.

Petitioner also argues that the Court of Appeals erred in its reconciliation because it did not "cite any evidence which would support the portrayal of petitioner as a dumper." Petition at 11. Petitioner ignores the undisputed evidence in the record regarding what Respondent's film crew saw when they arrived at the Newark dumpsite. Petitioner's factory was located immediately adjacent to hundreds of rusting and leaking 55 gallon drums containing chemicals, some of which were of the type used by Petitioner in his business. T. 1056-57. Moreover, Petitioner stored his chemicals in 55 gallon drums. While Petitioner testified he reported the dumping, the jury was instructed that it was entitled to disbelieve any witness' testimony, including Petitioner's account that these barrels suddenly appeared next to his business one morning. *See* T. 1101-02; JA 1404-19. Similarly, the jury was entitlied to discount or disbelieve the local fire chief's

5. The District Court's instruction on invasion of privacy was as follows:

> "For you to find for plaintiff Machleder on his false light claim, plaintiff must first establish that the broadcast, viewed as a whole, portrayed him as intemperate and evasive *or* as an illegal dumper of chemical wastes, and second, that those portrayals would be highly offensive to a reasonable person.
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> * * * *
>
> If you find that the broadcast did not portray him as intemperate and evasive *or* as an illegal dumper of chemical waste, or that it did not portray him in a light that would be highly offensive to the ordinary person, you may not decide in favor of plaintiff Machleder on this claim. If, on the other hand, you do find that the broadcast portrayed Machleder as intemperate and evasive *or* as an illegal dumper of chemical waste and also that such *portrayal or portrayals* would be highly offensive to an ordinary person, you must then go on to determine whether plaintiff has established that such *portrayal or portrayals* were substantially false." JA 1404-7 to 8 (Emphasis added).

hearsay statement, made during the course of Diaz's interview with him, that the waste had not originated locally, especially in view of the fire chief's bias as a local official. The jury also heard Deputy Fire Chief Miller's testimony that he thought Petitioner was culpable. JA 1050, 1060, 1062. Petitioner simply failed to satisfy his burden of proving that any portrayal of him as an illegal dumper was substantially false. *See Philadelphia Newspapers* v. *Hepps*, 106 S. Ct. 1558, 1563 (1986). Most significantly, he did not appeal the judgment entered on the jury's libel verdict and so that issue was not properly before the Court of Appeals and is not properly before this Court. *See Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 400-401 (1981).

Petitioner further argues that the Court of Appeals improperly reconciled the jury findings because in his view the jury may have been confused by the use of the word "statement" in the libel interrogatory. *See* Petition at 20. Since Petitioner has not appealed the judgment dismissing the libel claim, that question is not properly before this Court. More importantly, Petitioner's argument wrenches the language of the special libel interrogatory from its context. The District Court broadly instructed the jury in its libel instructions to "consider what the broadcast conveys through its structure, visual images, implications and connotations," and that "[i]t is not sufficient to take every sentence or scene separately and demonstrate its individual accuracy." JA 1805. In any event, Petitioner's argument ignores the requirements of New Jersey law. In *Bisbee* v. *John C. Conover Agency, Inc.*, 186 N.J. Super. 335, 452 A.2d 689 (App. Div. 1982), the highest New Jersey court to address the false light tort to date held that the "statement upon which the false light claim is based must be proved to be substantially false."[6] In short, the Court of

6. This Court should not deviate from its general policy of refusing to re-examine a lower court's determination of state law, especially where that determination does not conflict with any cited precedent from the relevant state's courts. *See Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963).

Appeals reconciled the jury interrogatories in the only rational way.

In addition to arguing that the Court of Appeals should have reconciled the verdicts in his favor, Petitioner now argues that the jury findings were inconsistent and that the Second Circuit "should have remanded for retrial the issue of falsity rather than dismiss the Petitioner's complaint." Petition at 26 n.15. This Court should not entertain this remand argument which was not presented to the Court of Appeals.[7]

In any event, a new trial is not warranted here. Since, as Petitioner concedes, "no appeal was taken from the judgment dismissing the libel claim," Petition at 8 n.7, that judgment is now final. *See* 1B *Moore's Federal Practice*, ¶ 0.404 at 131. *See also Terkildsen* v. *Waters*, 481 F.2d 201 (2d Cir. 1973) (where appeal taken from portion of judgment, appellant could not later challenge another portion of judgment). Accordingly, Petitioner is now precluded from relitigating the issue of whether he was falsely portrayed as an illegal dumper under either a libel or a false light theory. *See Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981); *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979); *Pritchard* v. *Liggett & Myers Tobacco Co.*, 370 F.2d 95 (3d Cir. 1966), *cert. denied*, 386 U.S. 1009 (1967). All that remains of Petitioner's false light claim is his argument that the broadcast falsely portrayed him as intemperate and evasive. As discussed below, this argument fails as a matter of state law. *See* Point II *infra*.

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7. *See Neely* v. *Eby Construction Co., Inc.*, 386 U.S. 317, 327, 329 (1967); M. Louis, *Post-Verdict Rulings on the Sufficiency of the Evidence: Neely* v. *Martin K. Eby Construction Co. Revisited*, [1975] Wisc. L. Rev. 503, 514. Petitioner argued to the Court of Appeals that the jury findings were consistent. Petitioner did not, as *Neely* intended, petition for a rehearing in the Court of Appeals. *Iacurci* v. *Lummus Co.*, 387 U.S. 86, 87 (1967) (per curiam). *See id.* at 89 (dissenting opinion of Harlan, J.) In discussing his arguments below, Petitioner contends he "also maintained alternatively, that it (sic) was entitled to have the libel claim remanded." Petition at 8. Yet, Petitioner's Brief to the Second Circuit contains no such argument. Moreover, Respondent's counsel has reviewed the tape of the oral argument before the Court of Appeals, and no such argument was advanced by Petitioner.

In these circumstances the Court of Appeals exercised its "informed discretion" and dismissed the complaint. *See Neely* v. *Eby Construction Co., supra,* 386 U.S. at 329. Petitioner has proffered no reason for this Court to disturb that exercise of discretion.

POINT II

THE ALLEGED PORTRAYAL OF PETITIONER AS INTEMPERATE AND EVASIVE IS NOT ACTIONABLE UNDER NEW JERSEY LAW BECAUSE NO REASONABLE JURY COULD FIND SUCH PORTRAYAL FALSE OR HIGHLY OFFENSIVE ON THE FACTS OF THIS CASE

A. The Evidence of Falsity was Insufficient as a Matter of Law

Respondent argued below that the broadcast is not actionable because it contains nothing false. As the Court of Appeals correctly noted, to the extent the broadcast portrayed Petitioner as being "intemperate and evasive," the broadcast was a virtually unedited film of Petitioner's public behavior and his evidence of falsity was insufficient as a matter of New Jersey law. This Court should not grant review to re-examine this alternative ground for dismissal which raises only issues of state law.

Petitioner complains that the broadcast concealed the fact that Petitioner was "provoked to anger by the conduct of the news team" and not by his own temperament. However, the virtually unedited film of the interview disproves Petitioner's assertion. Petitioner does not deny that he *was* intemperate and evasive when filmed. Whatever the cause of his temperament, the broadcast accurately portrayed it.[8]

By mischaracterizing the holding of the Court of Appeals on this issue, Petitioner attempts to create a conflict with decisions of

8. In *Cantrell* v. *Forest City Publishing Co.*, 419 U.S. 245, 253 n. 5 (1974), this Court refused to sustain a false light verdict against a photographer based on his uncontradicted testimony "that the photographs he took were fair and accurate depictions of the people and scenes he found at the [plaintiff's] residence." The Court of Appeals recognized the wisdom of that analysis here.

other circuits where none exists. The Second Circuit certainly did not "posit[] that a reaction or response captured on camera is an accurate portrayal as a matter of law." *See* Petition as 23. Rather, the Court of Appeals reviewed the broadcast and the evidence of falsity as to Petitioner's temperament and "evasiveness" and ruled it was insufficient as a matter of law in this particular case.[9]

Putting aside *Faber* v. *Condecor, Inc.*, 195 N.J. Super. 81, 477 A.2d 1289 (App. Div.), *certif. denied*, 99 N.J. 178, 491 A.2d 684 (1984), a misappropriation case which clearly has *no* application to the issue of falsity, the three allegedly "conflicting" decisions cited by Petitioner all involved photographs which appeared, without the plaintiff's consent, in *Hustler* and *Chic*, two magazines published by Larry Flynt.[10] The facts involved in those decisions are so dissimilar from those here that they require almost no discussion. Petitioner certainly does not contend he was falsely portrayed as having consented to appearing in this broadcast and, even if he did, this news report was a far cry from publications which include such other items as a photograph of a law professor's head protruding from a donkey's rear and a cartoon showing a doctor feeding a fetus to a rat. *Cf. Douglass* v. *Hustler Magazine, Inc.*, 769 F.2d 1128, 1136 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1489 (1986); *Wood* v. *Hustler Magazine Inc.*, 736 F.2d 1084 (5th Cir. 1984), *cert. denied*, 469 U.S. 1107 (1985). Moreover, the Second Circuit applied the same legal

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9. By referring only to the evidence specifically discussed in the opinion, Petitioner accuses the Second Circuit of relying "solely" on that evidence. Petition at 24. In fact, all of Petitioner's cited evidence (which includes three totally irrelevant references to "ambush interviews") was before the Court of Appeals.

10. Judge Posner has aptly noted that "this little niche of the law of privacy is dominated by Larry Flynt's publications." *Douglass* v. *Hustler Magazine, supra*, 769 F.2d at 1137. Respondent submits that this case falls far outside that "niche." Respondent's broadcast has none of the offensive characteristics of Larry Flynt's magazines, which courts have characterized as "vulgar and offensive" (*Douglass* v. *Hustler Magazine Inc., supra*), "coarse and sex-centered" (*Wood* v. *Hustler Magazine, Inc., supra*), and "hard-core" (*Braun* v. *Flynt*, 726 F.2d 245 (5th Cir.), *cert. denied*, 469 U.S. 883 (1984)).

standards as were applied in each of Petitioner's cited cases.[11] Petitioner's complaint that the Second Circuit reached a different result presents no issue warranting this Court's review.

The Court of Appeals applied the proper standards and correctly held that the broadcast portrayed Petitioner as he was.[12] *See Guccione* v. *Flynt*, 800 F.2d 298 (2d Cir. 1986) (reversing judgment after jury trial on grounds of substantial truth); *Rinsley* v. *Brandt*, 700 F.2d 1304, 1308 (10th Cir. 1983); *Tellado* v. *Time-Life Books*, 643 F. Supp. 904, 907 (D.N.J. 1986).

B. As a Matter of Law, the Alleged Portrayal of Petitioner as Intemperate and Evasive is Not Highly Offensive

Petitioner concedes that New Jersey law requires the Court to determine in the first instance whether "the communication is capable of bearing the meaning which is highly offensive to a reasonable person." Petition at 27. In any event, abundant case law supports the view that the Court must evaluate in the first instance whether a given publication is capable of a "highly offensive" meaning. *Faloona* v. *Hustler*, 607 F. Supp. 1341 (N.D. Tex. 1985), *aff'd*, 799 F.2d 1000 (5th Cir. 1986); *McCabe* v. *Village Voice, Inc.*, 550 F. Supp. 525, 529 (E.D. Pa. 1982); *Cibenko* v. *Worth Publishers, Inc.*, 510 F. Supp. 761 (D.N.J.

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11. *See Douglass* v. *Hustler Magazine, Inc.*, *supra*, 769 F.2d at 1137; *Braun* v. *Flynt*, *supra*, 726 F.2d at 252-53. *Wood* v. *Hustler Magazine, Inc.*, *supra*, was an appeal following a bench trial and is thus inapposite.

12. In the absence of a "conflict in substantial evidence" of falsity, the jury's finding that Petitioner was falsely portrayed as intemperate and evasive cannot stand. *Smith* v. *Shell Oil Co.*, 746 F.2d 1087, 1091 (5th Cir. 1984). Petitioner's reliance on *Lavender* v. *Kurn*, 327 U.S. 645 (1946) and similar cases is misplaced. *Lavender* was an appeal from a reversal of a negligence verdict in a Federal Employers Liability Act ("FELA") case. This Court's decisions under the FELA and the Jones Act (which Petitioner also cites liberally), indicate that the special features of those statutory negligence actions distinguish them from other tort actions, and the courts have been "especially reluctant to overturn a jury finding of negligence" under those statutes. *Morgan* v. *Consolidated Rail Corp.*, 509 F. Supp. 281, 285 (S.D.N.Y. 1980); *see Rogers* v. *Mo. Pac. R. Co.*, 352 U.S. 500, 509-10 (1957); *Prosser and Keeton on Torts* at 562 (5th ed. 1984). The standard of review in those cases is inapplicable here.

1981); *Fogel* v. *Forbes, Inc.*, 500 F. Supp. 1081, 1088 (E.D. Pa. 1980); *Bisbee* v. *John C. Conover Agency, Inc.*, 186 N.J. Super. 335, 452 A.2d 689 (App. Div. 1982); *Wood* v. *Fort Dodge Messenger*, 13 Media L. Rep. 1610 (Iowa Dist. Ct. 1986). Moreover, contrary to Petitioner's assertion, courts have narrowly construed the highly offensive standard. *E.g., Arrington* v. *New York Times*, 55 N.Y.2d 433, 441-42, 449 N.Y.S. 2d 941 (1982), *cert. denied*, 459 U.S. 1146 (1983).

Petitioner is unable to cite a single New Jersey case which supports his implicit suggestion that the Court lacked the power (or, indeed, that it did not have the duty) to determine this issue as a matter of law in the first instance. *See* Petition at 27-28. When Petitioner does compare his case with a New Jersey case, he cites *Faber* v. *Condecor*, 195 N.J. Super. 81, 477 A.2d 1289 (App. Div.), *certif. denied*, 99 N.J. 178, 491 A.2d 684 (1984), which involved a classic misappropriation of likeness for advertising purposes. *See* Petition at 23, 29.[13] *Faber* has nothing to do with the issue of offensiveness. The other cases cited by Petitioner (Petition at 28-29) are similarly inapposite. *See Time, Inc.* v. *Hill*, 385 U.S. 374 (1967) (action under New York misappropriation statute where highly offensive standard not considered); *Cantrell* v. *Forest City Pub. Co.*, 419 U.S. 245 (1974) (no discussion of highly offensive standard in case under Ohio or West Virginia law where fabricated falsehoods exposed plaintiff to ridicule).[14] Again, Petitioner's only complaint is that the Second

13. For example, Petitioner states that *Faber* involved the "unauthorized use of [a] family's photograph [which] gave [the] false impression that plaintiff was endorsing competitor's product." Petition at 29. Yet, the court in *Faber* did not even discuss the false light branch of invasion of privacy.

14. As discussed previously, (p. 14 n.10 *supra*), nothing in this broadcast even remotely compares with the offensiveness of the portrayals in *Douglass* v. *Hustler Magazine, supra, Braun* v. *Flynt, supra* and *Wood* v. *Hustler Magazine, supra*. Moreover, the courts in those cases applied the same standard as the Second Circuit applied here. *See note 11 supra*. As in the courts below, Petitioner incorrectly maintains that he was the victim of "an ambush interview." *See* Petition at i, 2 & n.1, 4, 14, 20, 24-25. Even if this were an ambush interview (which it was not), the point is entirely irrelevant to Petitioner's arguments here. Such evidence of Respondent's conduct has nothing to do with the truth

Circuit applied the correct standard but reached the wrong result. That issue, however, simply does not merit the attention of this Court.

CONCLUSION

For all the reasons set forth above, Petitioner has presented no persuasive reason for this Court to review the unanimous decision of the Court of Appeals. The Writ should be denied.

Respectfully submitted,

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or falsity of the broadcast or with the objective offensiveness of Petitioner's portrayal therein. Petitioner's endless discussion of "ambush interviews" is a classic red herring.